

**COMMONWEALTH OF MASSACHUSETTS
BEFORE THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

)	
Western Massachusetts Electric Company)	D.T.E. 01-99
)	

**WESTERN MASSACHUSETTS ELECTRIC COMPANY'S
MOTION FOR PROTECTIVE TREATMENT**

I. INTRODUCTION

On November 19, 2001, Western Massachusetts Electric Company ("WMECO") submitted to the Department of Telecommunications and Energy ("Department") its filing in the above-captioned proceeding. WMECO requests that the Department approve the terms of a 2001 Amendatory Agreement entered into with Vermont Yankee Nuclear Power Corporation ("Vermont Yankee"). The 2001 Amendatory Agreement is connected with the proposed sale by Vermont Yankee of its nuclear power station (the "Station") to Entergy Nuclear Vermont LLC and Entergy Corporation (together, "Entergy")

On January 11, 2002, the Attorney General, a party to this proceeding, submitted data requests to WMECO pertaining, in part, to the bids and bidding process relating to the sale of the Station. The material listed below, submitted in response to those inquiries, is confidential and commercially sensitive. This material has not been disclosed by any of the parties involved in the sale of the Station except under protective seal.

Accordingly, pursuant to G.L. c. 25 § 5D, WMECO respectfully requests that the Department protect from public disclosure in D.T.E. 01-99 the confidential portion of the responses to the following requests: AG IR1-3, 1-4, 1-11, 1-12, 1-18, 1-20, 1-25, 1-26 and 1-27 (the confidential portions are further specified in Section III.C, below). Disclosure of the contents of these responses could seriously endanger the sale of the Station and endanger future asset divestitures.

Pursuant to Department practice, the confidential material identified above and in Section III is being provided to the Attorney General pursuant to a Nondisclosure Agreement. A copy of the material is also provided to the Department separately in a sealed envelope. Public portions of the data requests listed above have previously been served on the service list in this proceeding

II. THE DEPARTMENT HAS THE AUTHORITY TO PROTECT COMPETITIVELY SENSITIVE INFORMATION.

The Legislature has provided the Department with statutory authority to prevent public disclosure of commercially sensitive materials. G.L. c. 25 §5D states in pertinent part:

[T]he department may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter.

The Department's procedural rules provide for the same protection. 220 CMR §

1.06(6)(c) states in relevant part:

1. Purpose. The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of parties, and ensure that a complete and accurate record is compiled.

2. Rules Governing Discovery. Because the Department's investigations involve matters with a wide range of issues, levels of complexity and statutory deadlines, the presiding officer shall establish discovery procedures in each case

which take into account the legitimate rights of the parties and ensure that the information necessary to complete the record is produced without unproductive delays. In exercising this discretion, the presiding officer shall be guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 *et seq.* These rules, however, shall be instructive, rather than controlling.

Massachusetts Rules of Civil Procedure, Rule 26(3) states, in part:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:...(7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designed way....

Accordingly, the Department has ample legal authority to prevent disclosure of commercially sensitive information in this proceeding.

III. IT IS INDISPUTABLE THAT THE MATERIAL AT ISSUE IS HIGHLY CONFIDENTIAL AND COMMERCIALY SENSITIVE AND SHOULD NOT BE PUBLICLY RELEASED

A. Bidding-Related Information Is Highly Confidential

The material for which WMECO seeks confidential treatment is specific information requested by the Attorney General relating to the identity of the bidders, the types of bids submitted and other bidding-related material. WMECO has sought, pursuant to Department guidelines, to seek confidentiality for the least amount of documentation consistent with the need for confidentiality. Vermont Yankee and JPMorgan, the auction agent for the Station, have treated the requested information as highly confidential throughout the auction process. Public disclosure of the material would be damaging for the auction process and contrary to ratepayers' best interest for the following reasons:

1. Any public disclosure of the bid-related information could endanger the sale. A successful result was obtained after a full and fair auction. The parties to the auction understood

the confidentiality of the bid information. There is no way to know what result would obtain if the rules were changed and the bidding-related information was made public. However, the release of the information publicly could well set off events that would endanger the sale. After the full and fair auction that has been conducted, the Department should not consider any action that would endanger the completion of the sale of the Station.

2. The auction process has resulted in a beneficial outcome for WMECO and, particularly, WMECO's ratepayers. WMECO's filing in this proceeding states the many benefits that will flow to WMECO's ratepayers, including a reduction in transition costs, should the sale of the unit proceed and the terms of WMECO's 2001 Amendatory Agreement be approved. Public disclosure of the bid-related information now can only have the effect of putting at risk the very real benefits that WMECO's ratepayers stand to realize upon closing.

3. If the Department orders the confidential information to be made publicly available in this proceeding, the Department will be undermining the success of future asset auctions in the Commonwealth. JPMorgan has proceeded with this and other auctions of generating assets based on the principle that bids would not become publicly available. JPMorgan has achieved impressive results with this process. *See, e.g.*, D.T.E. 00-68 (December 21, 2000). If bidders believe that confidential bid information will be publicly disclosed the result may be a significant chilling effect on future auctions (*e.g.*, by discouraging parties from participating) that leads to much less favorable sale terms for a seller. In fact, although this is not at all anticipated, if the sale of the Station were not to proceed in this instance, the release of the confidential information now could negatively impact future auctions of the Station. This is a huge, and unwarranted, risk to take; a risk that is essentially being taken with ratepayers' money.

B. The Department Has Already Recognized The Need To Protect Information Like That At Issue Here

Department precedent requires the party seeking protection for commercially sensitive materials to bear the burden of proving the need for such protection. *See Bay State Gas Co.*, D.P.U. 97-24, at 2 (September 23, 1997); *Standard of Review of Electric Contracts*, D.P.U. 96-39, at 2, Letter Seeking Comments (April 1, 1996) (Department will only protect contract terms which the utility has shown by a specific factual demonstration to be confidential, commercially sensitive or proprietary); *Standard of Review of Electric Contracts*, D.P.U. 96-39 at 2 Letter Order (August 30, 1996) (Department will accord protective status when the proponent carries its burden of proof by indicating the manner in which the data is competitively sensitive); *Colonial Gas Company*, D.P.U. 96-18, at 4 (1996), citing D.P.U. 96-39: "A proponent of a request must substantiate why such a request meets the requirements of G.L. c. 25, § 5D. A mere recitation that a particular document is 'competitively sensitive' or otherwise confidential is insufficient to meet that burden of proof."

Importantly, however, the Department, in practice, has often exercised this authority to protect market sensitive information, including bids and bidding information. *New England Telephone Co.*, D.P.U. 91-63-1 (November 15, 1991); *Boston Gas Co.*, D.P.U. 92-259 (April 30, 1993); *Berkshire Gas Co.* D.P.U. 96-24 (1997); *Standard of Review of Electric Contracts*, D.P.U. 96-39, Letter Order (August 30, 1996); *Western Massachusetts Electric Company*, D.T.E. 99-29 (June 30, 1999).

Other sale and contract-related proceedings in which the Department has exercised its authority to maintain sale/contact terms as confidential include: *Massachusetts Municipal Wholesale Electric Company*, EFSB 97-4 (May 31, 2000); *Western Massachusetts*

Electric Company/MASSPOWER, D.T.E. 99-101 (October 30, 2000); *Boston Edison Company/L'Energia Limited Partnership*, D.T.E. 99-16 (1999), p. 4; *Boston Edison Company*, D.T.E. 99-16 (1999), *Western Massachusetts Electric Company*, D.T.E. 99-56 (1999); *Western Massachusetts Electric Company/Springfield Resource Recovery Limited Partnership*, D.T.E. 99-56 (June 13, 1998). Both the Department and the Energy Facilities Siting Board have found such information to be confidential and entitled to protected treatment.

Moreover, and most directly on point, the Department has already recognized the need to protect the information such as that at issue here, and in fact has so ruled recently. *See Western Massachusetts Electric Company*, D.T.E. 99-74 (2000) and *Western Massachusetts Electric Company*, D.T.E. 00-68 (see *e.g.*, Tr., November 20, 2000, p. 124). In each of these cases, the Department has determined that bid information, including the identify of bidders and the terms of bids are highly confidential.

C. Protective Status for Certain Information Should Be Granted

WMECO, above, has clearly described the confidential nature of the material requested by the Attorney General and has demonstrated why the material is highly confidential and commercially sensitive. These showings fulfill WMECO's burden pursuant to the test established by the Department. The Department should grant protected, confidential status to the following:

AG IR1-3 (Attachments 1, 2 and 3)

AG IR1-4 (Attachment)

AG IR1-11 (Attachments 1, 2, 3, 4, 5 and 6)

AG IR1-12 (Attachment 1)

AG IR1-18 (Attachments 1 and 3 to 1-18(a), Attachment to 1-18(c), Attachment to 1-18(e))

AG IR1-20 (Attachment to 1-20(g))

AG IR1-25 (Attachment)

AG IR1-26 (Attachments 3, 8, 9, 10, 11, 27, 28, 29)

AG IR1-27 (Attachment)

IV. CONCLUSION

WHEREFORE, Western Massachusetts Electric Company respectfully requests that the Department grant this motion, and thereby issue, a Protective Order for the material specified in Section III.C, above. This material is of the highest sensitivity and should be protected from public disclosure pursuant to G.L. c. 25 § 5D.

Respectfully submitted,
WESTERN MASSACHUSETTS
ELECTRIC COMPANY

Stephen Klionsky, Esq.
101 Federal Street, 13th Floor
Boston, Massachusetts 02110
(617) 748-5140
e-mail: Klionsh@nu.com

Dated: January 30, 2002